Filed 2/25/05 P. v. Phillips CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHADRACK J. PHILLIPS, Defendant and Appellant.	A104896 (San Francisco County Super. Ct. No. 189306)

I. INTRODUCTION

Appellant's counsel filed an opening brief in which he raised no issues and asked this court for an independent review of the record as required by *People* v. *Wende* (1979) 25 Cal.3d 436.

Appellant was convicted of one count of second degree automobile burglary (Pen. Code, § 459),[1] one count of misdemeanor theft (§ 484, subd. (a)), and one count of misdemeanor possession of stolen property (§ 496, subd. (a)). After striking a prior first degree burglary conviction, the trial court suspended appellant's prison sentence on condition that he be placed on probation for five years, spend 360 days in county jail, complete a two year residential drug treatment program, and pay various restitution and other fines. We find no issues requiring further briefing, and hence affirm.

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

On Sunday, April 13, 2003, Margarita Manzo drove to work at her office at 2 Folsom Street, San Francisco, a building near the corner of Folsom and Spear Streets. She parked her car on Spear Street, and proceeded to her office, which was on the second floor of the building, and from which Manzo could see both down to Spear Street and into a large parking lot extending from it to Main Street, a block west.

While walking from her car to her office building, Manzo noticed a man, later identified by her as appellant, looking into the windows of cars parked on Folsom Street. Manzo got as close as ten feet from him and watched him for two to three minutes. He was, she testified, Caucasian, about six feet tall, thin, in his twenties, and wearing disheveled clothes, including a lavender sarong wrapped around his waist, khaki pants and a black jacket. He had, she continued, facial hair, a black backpack on his back, and a pair of blue goggles in his hands.

Manzo continued to watch appellant when she got into her office and went to its window. She watched as he peered into her car parked across Spear Street from her building and its window, and then as he went to the car parked in front of hers, a black sport utility vehicle (SUV). She saw him put on his blue goggles and place his right fist through a side window of the SUV.

Manzo quickly called 911 and reported to the operator what she was seeing, which included appellant rummaging around in the black SUV for several minutes, and then emerging carrying a case of water or soda and "some stuff piled on top." He then entered the large parking lot running between Spear and Main Streets, and Manzo lost sight of him. In all, Manzo testified, she watched appellant from her office window for about six minutes.

Three San Francisco police officers who responded to Manzo's 911 call testified. The essence of their testimony was that they found appellant about 20-30 feet away from

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[2] Because of the nature of this appeal and our disposition of it, our recitation of the underlying facts will be appropriately succinct.

the parking attendant's kiosk in the large parking lot. He had long, raggedy and dirty hair, a beard and moustache, tan pants and a black sweater and sandals; his hands were bleeding. Behind the kiosk, the police found a large pack of bottled water, a leather jacket, several CDs, a black umbrella, and a blanket. Some of these items had blood on them. The police also found that the right rear passenger window on the black SUV had been smashed and there was blood inside the car.

At some point after appellant's detention, Manzo went out to meet with the responding officers. They asked her to identify appellant in a "cold show." She told them it was the same person she had seen breaking into the SUV.[3] She was also able to identify some of the objects the police had found near appellant in the parking lot as those she had seen being taken from the van.

The owner of the van also testified, and stated that, when she returned to it in the afternoon of April 13, one of the windows was broken, there were blood stains on the door and seats, and several things (an umbrella, a leather jacket, several CDs, a case of water and sunglasses.) were missing from it.

On May 12, 2003, an information was filed charging appellant with one count of second degree automobile burglary (§ 459) and one count of receiving stolen property. (§ 496, subd. (a).) The information also alleged two 1991 convictions for robbery and first degree burglary. Appellant pled not guilty and denied the prior conviction allegations the following day.

Trial was scheduled to commence on July 9, 2003, on which day the prosecution filed an amended information which added a third count of misdemeanor theft. (§ 484, subd. (a).) It also added additional allegations of within-five year priors under sections

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[3] At trial, Manzo conceded she was unsure whether appellant was the person she had identified on the day in question, she was sure that, on that day, she had correctly identified the person the police were holding as the one she saw breaking into the black SUV. (See RT 283.) During the course of a pretrial hearing on a defense motion to dismiss, Manzo explained that appellant's appearance was now "substantially different" than that of the individual she had identified on April 13, in that appellant was now "shaved" and "clean," among other things. (RT 51-52.)

667, subdivisions (d) and (e), 1170.12, subdivisions (b) and (c), and 667.5, subdivision (b), plus another prior conviction allegation for grand theft (§ 487, subd. (3)) and for manufacturing a concealed weapon (§ 12020, subd. (a)) under section 667.5, subdivision (b). Over the first few days of trial, the court heard, considered, and then denied a motion by the defense to dismiss the case because of the alleged inability of Manzo to currently identify appellant as the person she saw breaking into the SUV three months earlier.

The jury trial actually commenced on July 11; a jury was empanelled late in the day on July 14 and opening statements begun. The trial ended when, on July 18, the jury returned guilty verdicts on all three counts alleged in the amended information. Appellant waived a jury trial on the prior conviction allegations and the prosecution's evidence on that subject was admitted without objection; the trial court found those allegations to be true.

On September 26, 2003, the trial court sentenced appellant. It first struck, on motion of the prosecution, appellant's prior robbery conviction. It also struck, in the interest of justice, appellant's first degree burglary conviction. The court then suspended imposition of a prison sentence and placed appellant on five years probation on the conditions noted above. Appellant filed a notice of appeal on November 21, 2003.

III. DISCUSSION

There were several pretrial motions, all of which were properly decided.

Regarding the trial itself, we note that no objections were interposed during either the prosecutor's opening and closing arguments and we, too, find nothing objectionable in the prosecutor's conduct.

Defense counsel provided effective representation, competently cross-examining both Manzo and the police witnesses, and then arguing to the jury that Manzo's inability to identify appellant at the time of trial and inconsistencies in her testimony regarding her April "cold show" identification of him, as well as some inconsistencies in the police testimony, entitled the jury to find there was reasonable doubt as to appellant being the person who broke into the SUV. The jury was, quite apparently, not convinced of this, as

they took only a little over three hours of deliberation to reach their verdict. Substantial evidence clearly supports their verdict.

"The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People* v. *Reilly* (1970) 3 Cal.3d 421, 425.) "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.]" (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576.)

All legally mandated instructions were provided the jury and, as far as the record before us discloses, no instructions requested by the defense were not given. The evidence amply supports the jury's verdict and there is no possible other error which could have caused a miscarriage of justice in this case. (Cal. Const., art VI, § 13.)

We also discern no error in appellant's sentencing. The court opted to both strike appellant's prior first degree burglary conviction (purportedly in the "interest of justice") and, also, to suspend appellant's sentence and place him on probation for five years, conditioned on his serving 360 days in county jail and paying certain fines.[4] It also apparently awarded him appropriate credits for the time already served.

In sum, we have thoroughly reviewed the record and find no arguable issues. While we have selected certain matters for discussion we have scrutinized the record in its entirety. There are no other arguable issues which require further briefing.

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[4] Significantly, especially in view of the court's action in striking the first degree burglary prior and giving appellant probation, the record reflects that, approximately a month after his notice of appeal was filed, the court revoked probation and appellant's release on his own recognizance, and ordered that a bench warrant issue for him. Appellant's *Wende* brief candidly notes that, at the time it was filed in August 2004, appellant was in custody awaiting sentencing on the probation revocation. (AOB 4, fn. 1.)

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.